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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 81 5026

RONALD DOUTHIT,

Petitioner,

vs.

WALTER D. ZANT, Warden,
Georgia Diagnostic and
Classification Center,

Respondent

---

APPENDIX TO

PETITION FOR WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF BUTTS COUNTY, GEORGIA

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Application No. 1476

# SUPREME COURT OF GEORGIA

ATLANTA, April 13, 1981

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

RONALD DOUTHIT V. WALTER B. ZANT, WARDEN

Upon consideration of the application for a certificate of probable cause to appeal filed in this case, it is ordered that it be hereby denied. All the Justices concur, except Hill, P.J., dissents.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Joline B. Williams, Clerk.

Appendix A

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

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|---|---|---|
| RONALD DOUTHIT, | : | |
| | : | |
| PETITIONER | : | |
| | : | CASE NO. 4663 |
| VS. | : | |
| | : | HABEAS CORPUS |
| WALTER ZANT, | : | |
| SUPERINTENDENT | : | |
| GEORGIA DIAGNOSTIC | : | |
| AND CLASSIFICATION | : | |
| CENTER, | : | |
| | : | |
| RESPONDENT | : | |

## O R D E R

This Habeas Corpus Petition challenges the constitutionality of Petitioner's restraint and the imposition of the death penalty by the Superior Court of Cobb County, Georgia. He was convicted of Murder and sentenced to death by electrocution. His conviction and sentence were affirmed by the Supreme Court of Georgia. Douthit v. State, 239 Ga. 81 (1977). Certiorari was denied by the United States Supreme Court. Petitioner's extraordinary motion for new trial was denied by the Cobb Superior Court and this denial was affirmed by the Supreme Court of Georgia. Douthit v. State, 244 Ga. 471 (1979).

Although this Petition asserts Seventeen Counts, evidence and argument were presented on only eight distinct points. The Court will address these issues, deeming the other unsupported contentions of the Petition to be waived and without merit.

The record in this habeas consists of the record and transcript of Petitioner's trial; the record and transcript of Rodney Dulaney's trial (a co-indictee); the record and transcript of Petitioner's extraordinary motion for new trial; the record and transcript of this habeas proceeding.

1.

The Petitioner contends that he was denied the effective assistance of counsel at both the guilt/innocence and penalty phases of the trial because his trial counsel: (1) failed to challenge the composition of either the grand or traverse juries; (2) failed to investigate the search and seizure of his kennel; (3) failed to interview a key state's witness; (4) failed to obtain or introduce evidence of Petitioner's bank accounts to show that the policy was not in effect; (5) failed to prepare for the penalty phase; (6) failed to put forth any evidence or witnesses at the guilt/innocence or penalty phases of the trial.

## FINDINGS OF FACT

Petitioner's trial counsel was Eugene Deal who was retained by Petitioner's relatives.

No motion was made at the trial stage challenging the array of the Cobb County Grand and Traverse Juries. No evidence was presented during this habeas proceeding or at the trial level indicating any disparity between the Grand and Traverse Juries and the general population of Cobb County.



Appendix B, p. 2

Petitioner's trial counsel did not make a motion to suppress evidence obtained as a result of the search of Petitioner's kennel by the Cobb County Police. Petitioner's trial counsel never requested and never saw the search warrant used to obtain this evidence.

Petitioner's trial counsel did not interview one of the key witnesses for the State, Roy Ursin, the secretary for Lincoln National Life Insurance Company. Petitioner's trial counsel also failed to obtain or introduce the bank records of the Petitioner to show the insurance policy was not in effect at the time of the murder.

Petitioner's trial counsel's only argument during the penalty phase of the trial was a short statement. (See T.T., p. 385). Petitioner's trial counsel did not put forth any evidence or witnesses on behalf of the Defendant during the guilt/innocence stage. (T.T. p. 340).

CONCLUSIONS OF LAW

The above allegations by Petitioner that his trial counsel was ineffective must be considered in light of the entire trial and the circumstances surrounding the trial. The standard of review for alleged inadequacies of trial counsel was established in a decision by the Fifth Circuit Court of Appeals. MacKenna v. Ellis, 280 F.2d. 529, 599 (5th Cir. 1960). Under MacKenna, effective assistance of counsel is "not errorless counsel and not counsel judged ineffective by hindsight, but counsel reasonably



Appendix B p. 3

likely to render and rendering reasonably effective assistance." The Georgia Supreme Court has adopted this standard. See Pitts v. Glass, 231 Ga. 638 (1974). It is under this standard that the alleged errors of trial counsel must be reviewed in order to determine whether the Petitioner was denied his Sixth Amendment right to counsel.

Under Ga. Code §50-127(1), the right to object to the composition of the grand or traverse jury will be deemed waived on habeas corpus unless the Court is satisfied that cause exists for allowing the Petitioner to pursue the objection. No such cause has been shown in this case.

The failure of trial counsel to challenge the grand and traverse juries of Cobb County does not demonstrate a failure to render reasonably effective assistance. The Cobb grand and traverse juries had recently been upheld prior to Petitioner's trial (Habeas Transcript 82); therefore, any challenge would probably have been unsuccessful. Therefore, Petitioner cannot use alleged ineffective assistance to satisfy the "cause" requirement of Code §50-127(1).

The failure of trial counsel to investigate the circumstances surrounding the search and seizure of items involved in the crime is alleged as another example of the ineffectiveness of trial counsel. No search warrant was produced at trial. However, this Court cannot presume that the missing search warrant was invalid. Indeed, the presumption is that the search was carried out in a lawful

manner unless rebutted. No such evidence has been produced. Additionally, the record indicates that Petitioner consented to and even assisted the police in their search. (T.T. 331, 332).

With these conclusions in mind, the failure of the trial counsel to file a motion to suppress cannot be deemed ineffective assistance of counsel.

Trial counsel's failure to interview one of the State's key witnesses, the insurance executive from Lincoln National, cannot be said to have constituted ineffective assistance. The gain that would have been derived from a pre-trial interview of this witness would not have substantially affected the outcome of the trial.

The Petitioner also contends that the failure of his trial counsel to produce his bank accounts to refute the insurance witness's testimony that the policy was in effect constituted ineffective assistance. However, even assuming trial counsel had produced evidence showing that the policy was not in effect at the time of the murder, the jury would still have been authorized to find that the Petitioner was not aware of this fact. Whether or not the policy was actually in effect is not as important as whether the Petitioner believed it was in effect. A rational trier of fact would be authorized to infer that the Petitioner believed he would recover the insurance proceeds. Accordingly, the failure of trial counsel to find and present this evidence cannot be said to have made any

difference in the outcome of the trial. Further, Petitioner has not demonstrated that his counsel could likely have discovered what the witness and the District Attorney did not - that the policy was not in effect at the time of the murder.

Petitioner complains that his trial counsel did not prepare for and did not render reasonably effective assistance during the sentencing phase of the trial. It is true that trial counsel offered no evidence and that his argument was extremely abbreviated. He was surprised by the guilty verdict and somewhat overcome. (H.T. p. 98). His reaction to a situation he had not anticipated was to do nothing, or at least very little.

Hindsight understandably leads Petitioner to the view that his counsel did very little if anything for him on the issue of sentence. But the constitutional issue is more difficult, because the requirement of the Sixth Amendment is that counsel be reasonably effective - not that he be excellent, errorless, or even the best available.

Without intending any disrespect to Petitioner's counsel, there are lawyers who might have done a better job. While we wish the ideal of justice were available equally to rich, poor, and middle class, it is not. While Petitioner's family was able to hire counsel for



Appendix B, p.6

him, the service he got was not of the highest possible quality.

But was it so bad that he was denied his Sixth Amendment right to counsel?

The Court must conclude not. The sad truth is that the most talented members of the legal community do not handle death penalty cases. While there are exceptions, most occupants of death row had less than imaginative representation. They could not afford it and the State did not provide it.

Measuring Petitioner's representation against the standard for handling death cases in Georgia, of which this Court has seen many, the Court cannot conclude that Petitioner's representation was so ineffective that his constitutional rights were denied. Most counsel in these cases do not offer evidence during the sentencing phase. The Court cannot say it is likely that the evidence proffered at the habeas hearing would have made any difference in the jury's sentence. (See H.T. pp. 93-95, p. 98). Neither can the Court say that a more lengthy argument by counsel on the issue of punishment would have been likely to produce a different result.

To show that counsel was not reasonably effective in a constitutional sense, Petitioner would have to point not only to questionable judgment or omissions by counsel but would have to show how different or more affirmative actions would have been

reasonably likely to affect the outcome of the trial. Petitioner in this case has been unable to do that.

The ineffective assistance claim is found to be without merit.

2.

Petitioner contends that his death sentence is arbitrary, capricious and disproportionate because Petitioner received the death sentence while his co-defendant, the actual "triggerman" who committed the murder received a sentence of life imprisonment at a subsequent trial.

FINDINGS OF FACT

The evidence at trial did not place Petitioner at the scene of the crime. (T.T. pp. 334-335). The Petitioner was tried on the theory of conspiracy, and the State contended that either or both of the co-defendants actually committed the murder.

The testimony at trial indicated that the Petitioner had knowledge of the location of the weapon after he was arrested. In fact, the Petitioner showed the investigators where the gun was located. (T.T. p. 331).

Petitioner took out an insurance policy on the victim Leonard Frazier on September 28, 1975. (T.T. p. 215-217). A change of beneficiaries occurred on December 10, 1975, one week before the murder. Petitioner was listed as the beneficiary. (T.T. 219-220). Petitioner called one of the insurance company's representatives to confirm



Appendix B, p.8.

that the change in beneficiaries had been effected. (T.T. 230).

The insurance policy was found in the trunk of Petitioner's car.

CONCLUSIONS OF LAW

Initially, the Court notes that the Georgia Supreme Court has indirectly considered and ruled against the Petitioner on this contention. Douthit v. State, 239 Ga. 84, 90 (1977). In determining that the death sentence was not disproportionate, the Georgia Supreme Court considered similar cases. However, it is not clear whether the Court considered the circumstance of Petitioner's co-indictee being sentenced to life imprisonment when there was evidence that Dulaney was the triggerman.

Thus, the Court will consider this contention on its merits.

Petitioner contends that the holding in Hall v. State, 241 Ga. 252, 260 (1978) requires that Petitioner's death sentence be vacated on the ground that it is disproportionate to the life sentence imposed on his co-indictee who was also found guilty of murder. Petitioner asserts that the evidence showed that he was not the triggerman and that Dulaney, his co-indictee, committed the act of murder. However, the Court in Hall distinguished a previous decision in which they found that the sentence of death was not disproportionate where the defendant, although not the triggerman, was in fact the "prime mover" or "mastermind" in the crime. See Hill v. State, 237 Ga. 794 (1976).



Appendix B, p.9

The evidence in this case as presented at trial and throughout the appellate proceedings is inconclusive as to who committed the act of murder. However, although Petitioner and his co-indictee were both convicted of the murder of Leonard Frazier, only the Petitioner was found to have committed the murder in order to get the proceeds of the life insurance policy taken out on the victim's life. There was sufficient evidence to authorize a jury's determination that Petitioner had committed the murder for himself or another for the purpose of receiving money or any other thing of monetary value. Ga. Code Ann. §27-2534.1(b)(4). This aggravating circumstance permitted the jury to recommend the death penalty. In the subsequent trial of Rodney Dulaney, the State's case was one of murder apparently without any additional statutory aggravating circumstances. The actions of these two co-indictees, although in concert, were intrinsically distinguishable. The nexus between the acts committed by Dulaney and those committed by the Petitioner is not sufficiently close to fall into the rationale of the Hall decision, supra.

Furthermore, the evidence demonstrates that Petitioner was, in fact, the "prime-mover" or mastermind of this plan. He procured the policy on Frazier, paid the premiums and knew of the change of beneficiary. The jury was authorized to find that the statutory aggravating circumstance existed. The death sentence imposed on Petitioner

is not excessive or disproportionate even in light of the lesser sentence given his co-indictee. See Gregg v. Georgia, 428 U.S. 133, 188 (1976).

This ground is without merit.

3.

Petitioner contends that the statements introduced against him were improperly obtained and that the statements and evidence obtained as a result of the statements were inadmissible.

The Georgia Supreme Court considered this issue in its review of the denial of Petitioner's extraordinary motion for new trial. That denial was affirmed by the Court. Douthit v. State, 244 Ga. 471 (1977).

Accordingly, this issue cannot properly be raised at the State habeas level because the Georgia Supreme Court has already considered the contention and ruled adversely to Petitioner's position. Goodwin v. State, 240 Ga. 605 (1978).

4.

Petitioner contends that the evidence seized from his residence was inadmissible because the search and seizure violated Defendant's Fourth and Fourteenth Amendment Rights.

FINDINGS OF FACT

The search of Petitioner's residence was conducted pursuant to a search warrant. No motion to suppress was filed on Petitoner's behalf. The evidence was admitted without objection.

Petitioner's trial counsel was not ineffective in failing to file the motion to suppress. (See Conclusions of Law, Part 1).

CONCLUSIONS OF LAW

Because Petitioner has not shown any cause or prejudice, he cannot raise this issue in this State habeas proceeding. Francis v. Henderson, 425 U.S. 536, 48 L.Ed.2d. 149, 96 S.Ct. 1708 (1976). Wainwright v. Sykes, 433 U.S. 72, 53 L.Ed.2d. 594, 97 S.Ct. 2497 (1977).

This contention is without merit.

5.

Petitioner contends that his conviction and sentence to death were based on false testimony.

FINDINGS OF FACT

State's witness, Roy Ursin, an employee of the Lincoln National Life Insurance Company, testified at trial that the insurance policy was in effect at the time of the murder. (T.T. 318-326). The insurance company later determined that the policy was not in effect at the time of the murder.

CONCLUSIONS OF LAW

As indicated previously, whether the policy was actually in effect at the time of the murder is not essential to the finding of intent by the jury. The evidence presented to the jury notwithstanding Mr. Ursin's testimony was sufficient to authorize the jury's finding of both the intent required to convict



Appendix B, p.12

for murder and also the (b)(4) aggravating circumstance.

This contention is without merit.

6.

Petitioner contends that the trial judge's charge on presumption was defective under Sandstrom v. Montana, 442 U.S. 510 (1979).

FINDINGS OF FACT

The entire charge during the guilt/innocence phase of the trial. (T.T. 365-379).

CONCLUSIONS OF LAW

Judge Hames charged the jury properly regarding the presumption of a person intending the natural consequences of his acts. Judge Hames prefaced his charge by stating that the presumptions to be given were rebuttable. (T.T. 372).

It has been held that there is no Sandstrom problem where the presumption charge is prefaced with the instruction that these presumptions are rebuttable, and no burden-shifting charge results. See Sandstrom, supra, at p. 519. Skrine v. State, 244 Ga. 520 (1979).

This contention is without merit.

7.

Petitioner contends that he was denied his right to confront witnesses against him by the admission of a prejudicial hearsay statement by his co-defendant.



Appendix B, p.13

FINDINGS OF FACT

The State introduced the testimony of Officer Morris Toler concerning the interrogation of Petitioner and his co-indictee, Rodney Dulaney. (T.T. 291). However, no statement of Dulaney was testified to except for the observation that he gave an alibi inconsistent with that of Douthit. The substance of any such statements by Douthit was never gone into at trial.

There was no objection to this testimony by Petitioner's trial counsel. (T.T. 291).

CONCLUSIONS OF LAW

This contention is factually without merit. Accordingly, no basis for relief is shown.

8.

The Petitioner contends that the instructions at the penalty stage were not sufficiently clear so as to inform the jury of their option of recommending the sentence of death or if they found mitigating circumstances they could recommend a life sentence even if aggravating circumstances were found.

FINDINGS OF FACT

The entire charge of the trial court at the penalty phase is the Court's sole finding on this issue. (See T.T. 385-388).

CONCLUSIONS OF LAW

The trial court's charge at the penalty phase of this trial is a model of clarity and precision. The jury was well instructed on their option of recommending either life or death for the Petitioner. The charge is in compliance with the requirements set forth by the Georgia Supreme Court. Spivey v. State, 241 Ga. 477, 481 (1978).

Appendix B, p. 14

This contention is without merit.

The last three contentions of Petitioner are unsupported by authority; however, the Court has nevertheless considered them but finds them to be completely without merit.

**JUDGMENT**

After careful consideration and deliberation of all the contentions asserted by Petitioner, this Court finds no substantial denial of any of Petitioner's constitutional rights under either United States or Georgia Constitutions. The writ of habeas corpus is hereby denied.

So Ordered, this 14th day of November, 1980.

R. ALEX CRUMBLEY
JUDGE SUPERIOR COURTS
FLINT JUDICIAL CIRCUIT

Appendix B, p. 15

# GEORGIA CODE PROVISIONS

Georgia Code Annotated Section 24-4526

**Appeals of Habeas Corpus After Criminal Convictions**

When Applications Granted An application to appeal a final judgment in a habeas corpus case after a criminal conviction will be granted where there is arguable merit.

Georgia Code Annotated Section 26-1101

Murder (a) A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.

(b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice.

(c) A person convicted of murder shall be punished by death or by imprisonment for life.

Georgia Code Annotated Section 38-801(d)

(d) Fees; mileage.--The witness fee shall be $10 per diem, and execution shall be issued by the clerk upon affidavit of the witness to enforce payment thereof. The payment of fees shall not be demanded as a condition precedent to attendance, but when a witness resides outside the county where the testimony is to be given, service of the subpoena to be valid must be accompanied by tender of the fee for one day's attendance plus mileage of 20 cents per mile for traveling expenses for going from and returning to his place of residence by the nearest practical route. Tender of fees and mileage may be made by United States currency or postal money order, or by cashier's or certified check. When the subpoena is issued on behalf of the state, or an officer, agency or political subdivision thereof, or a defendant in a criminal case, fees and mileage need not be tendered.

Georgia Code Annotated Section 50-127

Exclusive procedure for suing out a writ of habeas corpus for persons whoses liberty is being restrained by virtue of a sentence imposed against them by a State court of record

Notwithstanding the other provisions of the Title, the following is the exclusive procedure for suing out a writ of habeas corpus for persons whose liberty is being restrained by virtue of a sentence imposed against them by a State court of record:

APPENDIX C

P. 1

(1) Grounds for writ.--
Any person imprisoned by virtue of a sentence imposed by any State court of record who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of Georgia or the laws of the State of Georgia may institute a proceeding under this section. Except for objections relating to the composition of a grand or traverse jury, rights conferred or secured by the Constitution of the United States shall not be deemed to have been waived unless it is shown that there was an intentional or abandonment of a known right or privilege which relenquishment or abandonment was participated in by the party and was done voluntarily, knowingly, and intelligently. The right to object to the composition of the grand or traverse jury will be deemed waived under this section, unless the person challenging the sentence showa in the petition and satisfies the court that cause exists for his being allowed to pursue the objection after the conviction and sentence has otherwise become final.

(2) Petition and verification.--
The petition shall identify the proceeding in which the petitionor was convicted, give the date of rendition of the final judgment complained of, and clearlyset forth the respects in which petitioner's rights were violated. The petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached. The petition shall identify any previous proceedings that petitioner may have taken to secure relief from conviction. Argument and citations of authorities shall be omitted from the petition. The petition must be verified by the oath of the applicant or some other person on his behalf.

(3) Jurisdiction and venue.--
The petition must be filed in the superior court of the county wherein the petitioner is being detained. The superior courts of such counties have exclusive jurisdiaction of habeas corpus actions arising under this section.

(4) Service of the petition.--
Service of the petition shall be made upon the person having custody of the petitioner. If the petitioner is being detained under the custody of the Board of Corrections, an additional copy of thepetition shall be served on the Attorney General; however, if the petitioner is being detained under the custody of some other quthority other than the Board of Corrections, an additional copy of the petition shall be served upon the solicitor general of the county wherein the petition is filed. Service upon the Attorney General or the solicitor general may be had by mailing a copy of the petition along with a proper certificate of service.

(5) Custody of petitioner.--
Custody and control of the petitioner shall be retained by the Board of Corrections or other authority having custody of the petitioner and it shall be the duty of such board or authority to produce the petitioner at such times and places as the court may direct.

(6) Proceedings on petition.--
Within 20 days after filing and docketing of the petition, or within such further time as the court may set, the respondent shall answer or move to dismiss the petition. The court shall set the case for a hearing on the issues within a reasonable time after the filing of defensive pleadings.

App. C, p. 2

(7) Disposition in the trial court.--

(a) The court may receive proof by depositions, oral testimony, sworn affidavits, or other evidence.

(b) The taking of depositions upon written questions, by either party, shall be governed by the provisions of sections 81A-127 through 81A-132 and 81A-137: Provided, however, that the time allowed in section 81A-131 for service of cross-questions upon all other parties shall be 10 days from the date the notice and written questions are served.

(c) If sworn affidavits are intended by either party to be introduced into evidence, the party intending to introduce the affidavit shall cause it to be served upon the opposing party at least five days in advance of the date set for a hearing in the case. The affidavit so served shall be accompanied by a notice of the party's intention to introduce it into evidence. The superior court judge considering the petition for writ of habeas corpus may resolve disputed issues of fact upon the basis of sworn affidavits standing by themselves.

(d) If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence challenged in the proceeding and such supplementary orders as to rearraignment, retrial, custody, or discharge as may be necessary and proper. In all cases the court shall dispose of the matter as law and justice require.

(8) Transcribing proceedings.--

All trials held under this section shall be transcribed by a court reporter designated by the superior court hearing the case.

(9) Judge's findings of fact and conclusions of law.--

After reviewing the pleadings and evidence offered at the trial of the case, the judge of the superior court hearing the case shall make written findings of fac t and conclusions of law upon which the judgment is based. Such findings of fact and conclusions of alw shall be recorded as part of the record of the case.

(10) Subsequent petitions--waiver of grounds not claimed.--

All grounds for relief claimed by a petitioner for a writ of habeas corpus shall be riased by a petitioner in his original or amended petition. Any grounds not so raised are waived unless the Constitution of the United States or of the State of Georgia otherwise requires, or any judge to whom the petition is assigned, on considering a subsequent petition, finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition.

(11) Practice as to appeals.--

(a) Appeals in habeas corpus cases shall be governed by the Appellante Procedure Act of 1965 [§6-701 et seq], except that as to final orders of the court which are adverse to the petitioner, no appeal shall be allowed unless a justice of the Supreme Court of Georgia shall issue a certificate of probable cause for such appeal.

(b) Within 30 days from the entry of the order denying relief to the petitioner, a written application for a certificate of probable cause to appeal must be filed with the clerk of the Supreme Court of Georgia, if the unsuccessful petitioner desires to appeal. The petitioner shall also file, within the same period, a notice of appeal with the clerk of the concerned superior court. A justice of said appellate court shall either grant or deny the application within

a reasonable time after filing. So the justice may fully consider the request for a certificate, the clerk of the concerned superior court shall forward as in any other case, the record and transcript if designated, to the clerk of the Supreme Court of Georgia when a notice of appeal is filed. The clerk of the concerned superior court need not prepare and retain and the court reporter need not file, a copy of the original record and a copy of the original transcript of the proceedings. The clerk of the Supreme Court of Georgia shall return the original record and transcript to the clerk of the concerned superior court upon completion of the appeal if the certificate is granted. If the Justice of the Supreme Court of Georgia denies the application for a certificate of probable cause, the clerk of the Supreme Court of Georgia shall return the original record and transcript and notify the clerk of the concerned superior court and the parties to the proceedings below of the determination that probable cause does not exist for appeal.

(c) If the trial court finds in favor of the petitioner, no certificate of probable cause need be obtained by the respondent as a condition precedent to appeal. A notice of appeal filed by the respondent shall act as a supersedeas and stay the judgment of the superior court until there is a final adjudication by the appellate court: Provided, however, that while such case is on appeal, the petitioner may be released on bail as is now provided for in criminal cases, except where the petitioner has been convicted of a crime over which the Supreme Court of Georgia has jurisdiction to consider on direct appeal. The right to bail and the amount of bond shall be within the discretion of the judge of the superior court where the sentence successfully challenged under this chapter was originally imposed.

Georgia Code Annotated Section 27-2534.1(b)(4)

(b)(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

have any reason to believe at that time, still don't for that matter.

BY MS. WESTMORELAND: That's all the questions I have.

BY THE COURT: You may step down.

(WHEREUPON, Court recessed for the noon hour, and after lunch the following transpired:)

EUGENE DEAL, first having been duly sworn, testified as follows:

DIRECT EXAMINATION BY MS. WESTMORELAND:

Q Would you state your name for the record, please?

A Eugene A. Deal.

Q Mr. Deal, what is your occupation, please, sir?

A I'm an attorney.

Q How long have you been an attorney at law?

A I was admitted June 11, 1965.

Q And out of that time have you practiced in a number of criminal cases?

A Yes, ma'am.

Q Could you give me an estimate as to what percentage of your case load has been criminal work?



Appendix D, p.1

A I would say at least half of my practice.

Q In 1975 and 1976 did you represent the Petitioner, Ronald Douthit, on charges in Cobb County?

A I did.

Q What were those charges, please, sir?

A He was charged with murder.

Q Were you appointed or retained to represent Mr. Douthit?

A I was retained for the trial phase, to represent him during the trial.

Q What were the circumstances of your retention?

BY THE COURT: What do you mean?

BY MS. WESTMORELAND:

Q Who retained you?

A Oh, well I was first contacted by Mrs. Mary Foreman and her husband, Mr. Douthit's sister and brother-in-law.

Q Did she pay you?

A I believe that between her and Mrs. Douthit, Ronald's grandmother, they were the two people that were responsible for my fee.

Q Do you recall approximately at what time this was, what stage the proceedings were in when you were retained?

A I believe it was sometime before Christmas. It was after the 17th when Mr. Douthit was arrested, but between then and Christmas, and I don't know the exact date, of 1975.



Appendix D, p.2

Q Do you recall if it was prior to arraignment or specifically any of those details?

A It was prior to arraignment. It was prior to indictment I think.

Q Could you explain to the Court what your investigation of the case involved? What did you do in preparing for trial?

A Well, I talked with Mr. and Mrs. Foreman, talked with Mrs. Douthit, Ronald's grandmother; I went to the jail on several occasions and talked to Ronald; I spoke with all the witnesses that testified at the trial with the exception of Mr. Roy Erson, the insurance man who came down from Ohio, prior to trial.

Q Did you have an opportunity to talk with Mr. Erson before he testified?

A He was put on the stand and I believe at that time I -- Mr. Darden, the district attorney, and myself approached the bench and discussed my talking with him, having an opportunity to talk with Mr. Erson. Mr. Darden told me that he was only going to testify that there was an insurance policy. We had practically stipulated that fact. I did not make an issue about talking with him at point.

Q Did you file any pretrial motions in this particular case?

A Yes, ma'am. I filed two.

Q What were those motions?



Appendix D, p.3

A I filed a motion to sever, which was granted, and I filed a discovery motion.

Q That was a motion to sever Mr. Douthit and Mr. Delaney's trials?

A That's correct.

Q What was your other motion?

A The other motion was a discovery motion. And at that time when we argued the discovery motion Mr. Darden and myself got into quite an argument there and finally he just said, "I'll just let you copy the file." We went from the courtroom down to the Clerk's office -- went to his office and he got one of the girls there, gave her the file, and she went from there to the Clerk's office and she copied it. I got the copy.

Q So you had access to everything in his file, is that correct?

A Everything that was in the file that he had in the courtroom, I did, yes, ma'am, but I did not get a copy of the search warrant. I tried to get that and I never got that.

Q On how many occasions would you give an estimate that you would say you talked with Mr. Douthit prior to trial?

A I don't really know. I would say four or five at least, but I don't know exactly.

Q Did you discuss the case with him?

A That's right.

Q And did you discuss the possible consequences or the outcome of the case?



Appendix D, p.4

A Well, we discussed everything Mr. Douthit supposedly knew about the case. We also went through a commitment hearing prior to indictment, because at that time there were three men charged and it later developed after that commitment hearing one of them was released from jail.

Q Did you ever challenge the grand or traverse jury pools?

A No, I didn't.

Q Why didn't you?

A Well, I didn't really think it was necessary. I believe that there have been challenges to the grand and petit jury pools in Cobb County and they have been held to be constitutional. That was just a judgment call.

Q Did you conduct a voir dire at trial examining the jurors, potential jurors?

A Yes, ma'am.

Q Did you satisfy yourself that you had an impartial jury, as nearly as possible?

A As far as I could see I thought they were.

Q Did you make an opening statement at trial?

A No, I didn't. I asked the trial judge to allow me to make my opening statement at the close of the State's evidence. He would not do that. He said, no, that I either make it then or not at all, so I didn't make an opening statement.

Q Was that just a tactical decision?



Appendix D, p. 5

A Yes, ma'am.

Q What did you advise Mr. Douthit in regard to his testifying at trial?

A Mr. Douthit wanted to testify and at that time, since Mr. Darden, the district attorney, was trying the case and was a very experienced trial lawyer -- in fact there was a lot of talk then that he was probably the third most experienced trial lawyer in Cobb County behind Judge Luther Haynes and the former district attorney, Ben Smith. I didn't feel that Mr. Douthit would be able to withstand Mr. Darden's cross examinations, and I did not -- myself, along with Mrs. Foreman, his sister, talked him out of going on the stand. Now, he wanted to, he wanted to testify.

Q But you advised him not to?

A I did, yes, ma'am.

Q How did you feel in regard to the possibility of a conviction in this case? What was your impression as an attorney?

A I didn't really think that they would convict Mr. Douthit because I never believe that he was actually involved myself.

Q So you felt that you had a good chance for acquittal?

A I thought I did, yes, ma'am.

Q Did you introduce any evidence in Mr. Douthit's behalf at trial?

A None whatsoever, other than cross-examining of the State's witnesses.



Appendix D, p.6

Q Did you elicit any testimony concerning Mr. Douthit's character by way of cross-examination or otherwise?

A I believe one of the police officers, I'm not sure which one, I asked him if he had any records where Mr. Douthit had any prior arrests or anything. I believe at that time he went ahead and answered that he did not, but Mr. Darden had an objection and there was no further conversation along that line. But the jury did hear him answer that there wasn't -- that he had no record.

Q Did you present any argument at the sentencing phase of the trial after the conviction?

A My total argument at that time was that I had gotten a little upset with the jury coming back, and I told them -- my only argument was that they bring back whatever verdict they thought they could live with. Mr. Darden in his argument had argued to the jury that "they're going to get up here and they're going to beg for mercy and they're going to do this and that and the other," and I said, "No, we won't beg for mercy. You just bring whatever verdict you think your conscience will allow you to live with."

Q Do you think it would have been beneficial to make any further argument or present any additional evidence at that time?

A I don't know of any that I had at that time that I could have presented.



Appendix D, p.7

Q Were you made aware of any character evidence that might have been available for Mr. Douthit?

A I don't know of any specific character evidence.

Q Do you think it would have been beneficial to have introduced any evidence as to, say, his general reputation in the community?

A Not that I know of. After this police officer had testified he had no record, I thought that was -- the jury heard that and I thought this was about all we could do.

Q Did you request a Jackson V. Denno hearing at the trial?

A No.

Q Why not?

A Well, my understanding of the Jackson V. Denno hearing is you are entitled to -- when there is a confession involved, and it was my knowledge there had been no confession involved in this case at all. Mr. Douthit certainly didn't confess to it.

Q Did Mr. Douthit make a statement?

A He had talked to the police officers but at no time did he tell them that he had any connection whatsoever with it.

Q Prior to trial were you made aware of any circumstances involving Mr. Douthit's statement that would have made you think that that statement was coerced?

A Not prior to trial, no, ma'am.

Q Were you ever made aware of any such circumstances?



Appendix D, p.8

A Yes, ma'am. After the trial, and I would say possibly about two years, two and a half years ago, I spoke to Mr. Charles Norman one night and then went to his office within the next few days, and he told me at that time that he and Mr. Doug Williams, one of the detectives, were friends and that he could talk with Doug.

Q At that time had you been told that there was any --

A At that time I knew nothing about it. We were trying to see what we could find. Mr. Norman later came back and told me that he had talked with Mr. Williams and that he had lunch with him; and to start with Mr. Williams had said that he would tell him something but he wasn't to tell anybody. He told me that "I told Mr. Williams that if it was going to be in favor of Mr. Douthit not to tell me because I would use it." And he stated that Mr. Williams said, "Well, I'll just go ahead and tell you anyway." And at that time he told me what Doug Williams had told him, that the defendant, Delaney, while all three of the boys that were charged were in the room they had an electric cord wrapped around his neck with exposed ends and that all of them had been threatened that they would plug that cord in the wall socket if they didn't talk.

Q Had Mr. Douthit ever related this information to you?

A That's the first I knew of it.

Q And you did not know of it at any time prior to this incident with Mr. Norman?

A No.



Appendix D, p. 9

Q In regard to the search warrant and the information seized or brought to trial, did you object to the admission of any physical evidence at trial?

A I don't recall now. I don't remember.

Q Do you recall what was seized pursuant to the search warrant, the search warrant that the authorities say existed?

A That particular night they got the insurance policies from the trunk of Mr. Douthit's car. It's my understanding they got some blood samples from some, either from the wall or pieces of wood in the basement of the canine kennel, where they were that night -- now what happened I don't know.

Q Were those blood samples ever positively identified at trial?

A No, ma'am. On the extraordinary motion for new trial they called in a man from the State Crime Lab and he testified that they were compatible with Mr. Fraizer, the victim's, blood. That's all. He didn't testify at the trial.

Q At the conclusion of the trial in Cobb County, what action did you pursue in Mr. Douthit's behalf?

A After Mr. Erson testified that there was an insurance policy and that it was in effect through that date, that was January 28th I believe, I didn't know he was going to testify as to how it was paid for, and in my cross-examination I asked him how this policy was paid for and he told me it was paid for by an automatic deduction on my client's accounts in one or two banks, the First State Bank of Cobb County and the C&S National Bank. Well, this trial went over until about 10:30 at



Appendix D, p.10

night. So the following day I went to both banks and asked them about Mr. Douthit's account. They both told me that they would not release that information to me since I had no authorization from Mr. Douthit. I went back to the trial judge and got him to sign an order ordering them to release the information to me. I carried it back and -- the reason for doing this, when Mrs. Foreman and her husband came to my office the first time, they had told me that Mr. Douthit had no bank accounts, they had been closed and he had no money. That was the reason that they and the grandmother were going to have to pay my fee. When I first talked to Mr. Douthit in jail he told me the same thing. So when I went to the banks the First State Bank of Cobb County told me that yes, Mr. Douthit had an account. In fact, they gave me an affidavit. He had an account there and it was closed in May of 1975. The C&S Bank said that yes, that he had two accounts, one in his name and one in the company name of, I believe it was Sweetwater Kennels, that the one in his name was closed in October of 1975 and the one in the company name was closed in November of 1975, and for the three or four months prior that there had been nothing paid to the Lincoln National Life Insurance Company. This we used as new evidence, as one of the grounds of new evidence in our motion for new trial. Of course, that was overruled by Judge Haynes.

Q After the motion for new trial did you file for direct appeal?



Appendix D, p. 11

A Yes, ma'am.

Q Were you appointed for that appeal?

A Yes, ma'am.

Q Could you tell the Court the result of that appeal?

A Well, the Supreme Court adopted almost the identical language Judge Haynes did in overruling the motion for new trial, and sustained it.

Q After the Supreme Court affirmed Mr. Douthit's case on direct appeal, did you participate in the case any further?

A Only as the, I guess an associate of Mr. Farmer.

Q Did you file a habeas corpus petition in Butts County?

A He and I together did, yes, ma'am.

Q And you participated in the initial --

A Well, I did file a motion for a stay with the Supreme Court. We did not file a certiorari -- I did not file a certiorari.

Q Do you recall why you did not file the certiorari initially?

A Well, Judge Haynes at that time, the trial judge, had a couple of heart attacks and had open heart surgery, and I don't know, it just kept lingering along, and it was over a year there that there was nothing done on the case at all.

Q So, no sentence had been imposed?

A No sentence had been imposed. In fact, the only reason that, so Judge Haynes told me, that there -- he knew a sentence a sentence was imposed was he made his secretary get all the death penalty cases that he had and bring them to him and he found



Appendix D, p.12

Mr. Douthit's was just sitting there without a sentence, and this was a year and a half after the Supreme Court of Georgia had decided the case. At that time he set a new sentence.

Q Did you request assistance from other attorneys in preparing either the request for a stay or the habeas corpus petition?

A The habeas corpus, yes. I went to Mr. Farmer's office myself and he and I together did that.

Q Mr. Deal, do you recall any plea negotiations that were conducted in regard to Mr. Douthit's case?

A I don't believe there was any. Oh, I spoke with Mr. Darden about it but I don't believe he was interested in any plea bargaining at all at the time, and I don't know that we could have done it anyway because Mr. Douthit contended he was not guilty at all.

Q Were you aware of the fact that the State was seeking the death penalty in Mr. Douthit's case?

A Not until just prior to trial. I knew it within a week of the trial. Mr. Darden served me, had a hand-delivered ltter to me saying that he was going to ask, and setting out the grounds that he was going to ask for the death penalty on.

Q Did you actually feel that the case would get to the sentencing phase?

A I really didn't think so.

BY MS. WESTMORELAND: Those are all the questions I have.



Appendix D, p.13

CROSS-EXAMINATION BY MR. NURSEY:

Q Mr. Deal, you testified that you were retained sometime between December 18th and Christmas of 1975, is that right?

A Yes, sir.

Q And Mr. Douthit told you the first time you talked to him about the bank accounts?

A That's right.

Q And what was --

A But he didn't tell me about particular accounts. He just said he did not have an account at the bank, that they had been closed.

Q Did you ask him what banks they were in?

A I believe we discussed the one at the First State Bank of Cobb County. I don't remember whether we discussed the C&S Bank or not.

Q What month was the trial in 1976?

A In January.

Q What part of January?

A The 27th and 28th.

Q So there was a little over a month then between the first time you talked with Mr. Douthit and the trial, is that correct?

A That's correct.

Q And during that time you never got the records on his bank accounts?



Appendix D, p.14

A No, sir.

Q That is correct?

A That is correct. I did not get them.

Q You never filed a motion to suppress the evidence that was obtained from the search, did you?

A No, sir.

Q And you testified that you never had a copy of the search warrant?

A That's correct. I never saw a copy.

Q You made your decision not to file a motion to supppres without ever seeing the search warrant?

A That's right.

Q You said you didn't request the Jackson-Denno hearing -

BY THE COURT:

Q Before you respond, I have one question. Mr. Deal, why did you decide against filing a motion to suppress?

A Your Honor, I don't remember at this time just why.

Q Well, were you aware that there had been any kind of search?

A No, sir, I don't think so. I believe that Mr. Vining had said to me that he had gone to his automobile and gotten these things out of the trunk of his car himself. And as far as I know, there was nothing that they got out of that house down there that was used at the trial.



Appendix D, p. 15

BY MR. NURSEY:

Q Mr. Deal, they introduced a screen that was taken out of the basement, did they not?

A No, sir. I don't recall whether they did at the trial or not. I know the man from the Crime Lab that testified about t blood did not testify until the motion for new trial; but whether or not they introduced that screen at the trial, I could not answer.

Q Was there not testimony during the trial about blood being on the screen?

A There was testimony about there being blood, but --

Q And did they not have a blood expert at the trial testify that it was human blood?

A He could have. I don't recall.

Q There could have been?

A There could have, yes, sir.

Q And that was taken out of the basement of the kennel, that screen?

A I believe that's what they said.

Q You said you didn't ask for a Jackson-Denno hearing because there were no damaging statements, is that correct?

A I don't believe I said there were no damaging statements. I said because he had not confessed or claimed to have any part in it.

Q Would you admit that there were damaging statements?

A Mr. Nursey, I assume there was because the jury believed something to convict him of that, so I assume that there



Appendix D, p. 16

were possibly some damaging statement by that.

Q If the police claimed that Mr. Douthit told them where a gun was, would you not -- and that gun is being considered the murder weapon, would you not consider that a damaging statement?

A Possibly, and at the time Mr. Douthit explained the reason the gun was found at that particular place, and I thought it was a reasonable explanation.

Q Which Mr. Douthit never told at trial?

A No, he did not tell it.

Q But you would admit that at least it had potential for being damaging, you know, whether there was a credibility conflict or not, you admit there was a potential for it being a damaging statement concerning a gun?

A Yes, sir.

Q Mr. Deal, did you ever discuss with Ron Douthit his right to challenge the composition of the grand and traverse juries?

A I don't believe so.

Q You didn't?

A I don't believe I ever discussed that with him.

Q Isn't it true that you stated the reason you don't file those type challenges is that you think that when a black person is on trial white jurors are more sympathetic toward them?

A (No response.)

Q Have you not in the past stated the reason you don't file such challenges, challenge to the grand and traverse juries,



Appendix D, p17

is that when a black person is on trial you think white jurors are more sympathetic to them?

A No, I don't believe I have made a blanket statement. I think I told you and also Ms. Westmoreland in this particular case that had there been -- I mean I probably would not have -- I probably would have struck the two black jurors that were there if Mr. Darden had not done so because I have found that where I have represented black man and there were black jurors taken, that they were the first that wanted to convict him. In this situation, unless Mr. Douthit himself had insisted that we take the two black jurors and if we had had that opportunity that I probably would have struck them myself.

Q And you never informed him of his right to file such a challenge?

A I don't believe I discussed that with him at all.

Q And there was an all-white jury in this case?

A Sir?

Q There was an all-white jury in this case?

A Yes, sir. All the jurors picked were white, yes, sir.

Q And how many jurors out of the panel of 48 were black?

A All I remember is two out of the 48 jurors we had to strike from.

Q And Mr. Darden struck both of those?

A Yes, sir.

Q When the issue of Mr. Douthit testifying came up, you stated before that Mr. Douthit did what you would describe literally as begging to testify on the stand?

A That's correct, yes, sir.

Q He begged you to let him testify?

A He wanted to get on the stand, yes, sir.

Q And wanted to explain his innocence in this case?

A He didn't tell me what he wanted. He wanted to get up there. I assume that's what he wanted to do.

Q You have testified that you never filed a petition for writ of certiorari to the United States Supreme Court in this case as it was affirmed by the Georgia Supreme Court, is that right?

A Right.

Q And you said the reason you didn't do it is because there was no execution date set. The reason that you did not file certiorari was that there was no execution date set?

A I don't remember now what the reason was. I didn't do it anyway.

Q Didn't you just finish testifying on direct that Judge Haynes had had open heart surgery and did not set any dates in this case so --

A That was what happened, yes, but I don't know that that was the exact reason I didn't file any. I don't remember now why it wasn't filed. I did not file one.

Q Is it your opinion that an execution date needs to be set before certiorari can be filed?

A No, sir.

Q Mr. Deal, what evidence did you prepare for the penalty phase of this trial?

A I don't guess we prepared any because I didn't really think we were going to get that far, Mr. Nursey.

Q You didn't think there would ever be a penalty phase?

A No, sir.

Q Mr. Douthit had no prior record, is that correct?

A As far as I could determine he had none.

Q And the only evidence you place before the jury to let them know that was one question to a police officer asking him if his records reflected that Mr. Douthit had any record?

A The police station records, not his records.

Q That's the only evidence you presented to the jury on the issue of whether Mr. Douthit had no prior record?

A Yes, sir.

Q Did you ever go to Mr. Douthit's neighborhood and interview any of the people he grew up with?

A Well, I've gone to Mr. Douthit's neighborhood. Now, I don't know about people who grew up with him. I talked to some of the people who live in that neighborhood but -- like his grandmother and Mrs. Foreman, I talked to her down in that neighborhood, I talked to his aunt across the street, I talked to the dead man's mother, but I don't remember whether it was in that neighborhood or whether that was at the courthouse. I'm not sure about that. I talked to several people down there. Whether they were the ones that grew up with Mr. Douthit I don't know.



Appendix D, p.20

Q You said that the only argument you presented to the jury during the penalty phase was "do what your conscience tells you is right." Am I more or less paraphrasing correctly?

A I just told them to bring back whatever verdict that their conscience would allow them to live with.

Q And you said at that time you were pretty upset with the jury after returning the guilty verdict?

A Right.

Q Did you request any kind of continuance to prepare evidence for the penalty phase?

A No, sir.

Q Did you request any kind of recess or continuance for your emotions to cool down for a little while?

A No, sir.

Q You stated that you didn't interview Mr. Erson before he testified at the trial, is that correct?

A That's correct.

Q The testimony that he gave took you by surprise, then, is that correct?

A The part about how this insurance policy was paid for did, yes, sir.

Q And if you had known before he was going to testify that he was going to testify to that, what would you have done?

A I would have had the bank records there.

Q And you would consider that properly representing Mr. Douthit, to bring in the bank records had you known Mr. Erson



Appendix D, p. 21

was going to say that?

A If I had known that's what he was going to testify to.

Q That would have been proper representation of Mr. Douthit to bring in those bank records?

A Sure it would.

Q Did you ask for a continuance after Mr. Erson testified to prepare the bank records?

A No, sir, I didn't.

Q Mr. Deal, were you aware of the fact that Ron regularly attended church at the Second St. John Baptist Church in Smyrna before he was arrested in this case?

A No, sir. He never mentioned church to me.

Q Are you aware that he had a good reputation in his community?

A Yes, sir. In fact, we had one of the jurors that was excused because he testified that his grandmother was a good friend of theirs and she visited in their home and had an excellent reputation, and that if he were chosen that he would be prejudice toward Mr. Douthit. When Mr. Darden asked the trial judge to do so, he excused him for cause.

Q Do you know that he used to drive his grandmother to church every Sunday and that he used to take his grandmother to the grocery store and other places all the time? Were you aware of that before the trial?

A No, sir.



Appendix D, p. 22

Q And were you aware that he used to help out people in the neighborhood doing the yard work for them and running errands for them and things like that?

A I don't know about yard work and running errands. He apparently was helpful around there to different people. I don't know any specific chores.

Q You knew that he had no prior record?

A I had not found any. He told me he didn't have any and I didn't find any from the -- by talking with Mr. Darden. They couldn't come up with any rap sheets where he had a record.

Q And did you know that he had been employed pretty regularly since high school, worked after school and then after he graduated he was employed fairly regularly?

A No. It seems to me like it's -- and my information was that he had not been employed too regularly and that he had a lot of different jobs.

Q But he kept a job; was always working and supporting himself and helping his grandmother?

A I don't know about that.

Q You didn't know about that?

A No, I didn't.

Q You were aware that he tried to help organize like baseball games and other activities for children in the neighborhood and in his community?

A No, sir, he didn't mention that to me.



Appendix D, p.23

Q You weren't aware of that?

A No, sir.

Q Do you think that some of that information might have led the jury to look upon Ron a little bit more favorably and maybe have spared his life?

A No, sir, I really don't, Mr. Nursey, because all that jury heard from Mr. Darden was that "here's a man that killed to collect an insurance policy," when actually there wasn't an insurance policy. I don't think anything that he could have said, even if he had testified, I don't believe it would have changed that jury's mind.

Q And that's all the jury knew about --

A That's all they knew about, just the fact that he had -- Darden said, and all the testimony that was elicited from the people to explain to them that this man killed to collect an insurance policy.

Q And all their knowledge of his character was a man who killed to collect an insurance policy?

A Except that they had this statement by the officer that he found no record.

BY MR. NURSEY: I don't have any other questions.

BY MS. WESTMORELAND: We have no further questions.

BY THE COURT: Thank you, Mr. Deal. You may step down. Do you have other witnesses?

BY MS. WESTMORELAND: No, Your Honor, we have no other witnesses.



Appendix D, p. 24